FILE COPY

Office - Supreme Court, U. S.
FILED

NOV 15 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED, AND IN ITS INDIVIDUAL CAPACITY, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, AND JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

J. F. DAMMANN,
WILLIAM B. McILVAINE, JR.,
Attorneys for The First National Bank of Chicago.
CRANSTON SPRAY,
Attorney for Gwendolyn Young, Heyworth Koch.
DAVID A. WATTS,
Attorney for Marie Julia Young, Kaufman Pratt, Otto Young Kaufman, Ottilie Wickes Cochran, Betty Wickes Sage, Nancy Wickes Shaw, Walter F. Wickes, Jr., Catherine Young Wickes, and John William Young Martin.

Of Counsel:
WILSON & McILVAINE,
120 W. Adams Street,
Chicago, Illinois.
SCOTT, MACLEISH & FALK,
134 S. La Salle Street,
Chicago, Illinois.
BELL, BOYD & MARSHALL,
135 S. La Salle Street,
Chicago, Illinois.

INDEX.

		PAGE
Statement of Matter Involved		2
Opinions Below		8
Jurisdiction of This Court		9
The Questions Presented		9
Reasons for Granting the Writ		10
First:	Conflict with Other Circuits re Control of Federal or State Law	10
	Conflict with Decisions of Supreme Court re State Law and Related Jurisdictional Requirements	11
Second:	Conflict with Illinois Decisions	13
Third:	Conflict with Supreme Court Decisions If Federal Law Controls	15
Fourth:	Conflict with Decisions of Other Circuits If Federal Law Controls	20
Fifth:	Review Is Fundamental to the Further Conduct of This Case	21
Appendix—Young Family Tree		24

TABLE OF CASES CITED.

Baird v. Peoples Bank & Trust Co., 120 Fed. (2d) 100. 20
Barney v. Baltimore City, 6 Wallace (73 U. S.) 280.. .....15, 17, 19
Bell v. Preferred Life Society, 320 U. S. 238..... 11
Berg v. Merchants, 15 Fed. (2d) 990 (Certiorari denied, 274 U. S. 738)..... 20
Brown v. Riggin, 94 Ill. 560..... 15
Cities Service Co. v. Dunlap, et al., 308 U. S. 208..... 12
Commonwealth Trust Co. v. Smith, 266 U. S. 152.... 19
Crutcher v. Joyce, 134 Fed. (2d) 809, 10 Circ. (1943). 20
Dawson v. Columbia Trust Co., 197 U. S. 178..... 2
Delaware County v. Diebold Safe Co., 133 U. S. 473.. 12
Giese v. Terry, 388 Ill. 188..... 15
Gregory v. Stetson, 133 U. S. 579..... 19
Grisso v. U. S., 138 Fed. (2d) 996..... 20
Hauser v. Powers, 351 Ill. 36..... 15
Hayden v. McNamee, 392 Ill. 99 (1945)..... 15
Horn v. Lockhart, 84 U. S. 570..... 19
Indianapolis v. Chase National Bank, 314 U. S. 63, 96 Fed. (2d) 363; 305 U. S. 600; 113 Fed. (2d) 217; 311 U. S. 636; 314 U. S. 63.....2, 21
Kendrick v. Kendrick, 16 Fed. (2d) 744; certiorari denied, 273 U. S. 758..... 21
Lyeth v. Hoey, 305 U. S. 188..... 12
McCreery v. Bartholf, 305 Ill. 325..... 14
Niles-Bement-Pond Co. v. Iron Moulders Union Local No. 68, et al., 254 U. S. 77.....2, 16
Oglesby v. Springfield Marine Bank, 385 Ill. 414..... 15
Payne v. Hook, 74 U. S. 425..... 19

Riley v. Webb, 272 Ill. 537 13
Rodisch v. Moore, 253 Ill. 296 15
Shields v. Barrow, 17 Howard (58 U. S.) 130 19
State Life Insurance Co. v. Board of Education, 394 Ill. 301 15
Taylor v. Anderson, 275 U. S. 431 11
Thomson v. Butler, 136 Fed. (2d) 644, certiorari denied, 320 U. S. 761 11
United States v. General Motors, 323 U. S. 373 21
Updike v. Smith, 378 Ill. 600 13
Walker v. Cook, 294 Ill. 294 14
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33. 19
Winger v. Chicago Bank & Trust Co., 394 Ill. 94 19
Young v. Garrett, 149 Fed. (2d) 223 10

TEXT BOOKS, ETC.

American Jurisprudence, Vol. 19, Equity, Sec. 17, P. 48 19
Federal Rules of Civil Procedure, Rule 19 (Rule 82 and Enabling Act U. S. C. A. Par. 723(b) and (c)) 12
Foster on Federal Practice, 6th Edition, Vol. 1, P. 126 2
Illinois Revised Statutes 1905, Chap. 39 § 1 16
Illinois Revised Statutes 1905, Chap. 148 § 1 16
Pomeroy's Equity Jurisprudence, 5th Edition, Vol. 4, Secs. 1316, 1378 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

THE FIRST NATIONAL BANK OF CHICAGO, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED, AND IN ITS INDIVIDUAL CAPACITY, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, AND JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its individual capacity, Gwendolyn Young Heyworth Koch, Marie Julia Young Kaufman Pratt, Otto Young Kaufman, Ottilie Wickes Cochran, Betty Wickes Sage, Nancy Wickes Shaw, Walter F. Wickes, Jr., Catherine Young Wickes, and John William Young Martin, by their respective attorneys, respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

There is here involved the question whether the Federal District Court in Illinois has jurisdiction to hear and determine this cause.

The plaintiff, an alien, alleged diversity of citizenship jurisdiction, the defendants being citizens of several States.

Jurisdiction was challenged on the ground that upon the accepted principle of realignment of parties in accordance with their interests, certain Illinois citizens, parties defendants, became aligned on the side of the plaintiff and opposed to other Illinois citizens; thereby destroying diversity of citizenship jurisdiction. (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69; *Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77, 81; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180; *Foster on Federal Practice*, 6th Edition, Vol. 1, P. 126.

After argument on this question and pending the filing of briefs, the plaintiff moved for leave to dismiss as not indispensable the defendants whose presence defeated diversity of citizenship, and to file an amended complaint omitting such persons as parties defendant. (R. 128.) The proposed amended complaint was submitted with the motion and is found in the record. (R. 163, 128-156.)

The District Court, having considered the pleadings and the proposed amended complaint and briefs and oral argument, denied the motion for leave to dismiss such defendants, and the motion for leave to file the amended complaint, and dismissed the cause for lack of jurisdiction. (R. 162.)

On appeal the Circuit Court of Appeals recognized the validity of the realignment rule, but held that the parties defendant in question were not indispensable, that the

cause could proceed to a decree without them and that, therefore, diversity of citizenship did exist. The decision of the District Court was reversed.

The determination of this fundamental question, whether certain parties are indispensable to this litigation, depends upon the interest of the parties, plaintiff and others, in the subject matter of the suit, as those interests appear from the facts set up in the complaint.

The original plaintiff is named in the complaint as "Joseph Maria de Korwin (otherwise known as Count Korwin-Sokolowski)," (R. 3) "a citizen of the Republic of Poland domiciled in Cannes, France, and sojourning presently in Chicago, Illinois." The defendants are described as citizens of Illinois, California, Florida, Maryland, Michigan, New Jersey, and Pennsylvania. (R. 4.)

While the suit was pending in the District Court, the plaintiff died and his widow, Margaret de Korwin, individually and as Executrix of his estate, was substituted as plaintiff. For convenience, however, we will refer to the original plaintiff. (R. 160, 161.)

His suit, which was brought in November 1943, sought to declare invalid the trust provisions of the residuary clause of the Will of Otto Young of Chicago who died in 1906, and to declare the property of the decedent to be intestate and to pass under the Illinois Statute of Descent to the "heirs" of the decedent, the plaintiff using the term "heirs" to mean the original heirs and all those claiming through the deceased heirs, that is, their heirs, executors and administrators. In this petition we will use the term "heirs" as the plaintiff has used it.

The plaintiff states he is the divorced husband of a daughter of Otto Young, Selma Cecile, who died in 1935, and that they had one child, Stanislaus Stephen de Korwin, (sometimes known as Stanley Korwin Young) who died intestate and without issue. Upon these facts he claims

that he has become an heir of Otto Young. (Par. 6, 7, R. 5; Par. 20, R. 13.)

He made as parties defendant some but not all of the beneficiaries of the trust created by the Will, and some but not all of the heirs who would now be entitled to share in the property of the decedent if it were held to be intestate. (R. 44.)

The complaint alleges: That the decedent, Otto Young left as his sole heirs a widow and four daughters; that the residuary clause of his Will set up a trust estate consisting of cash, securities and "many parcels of real estate situated in the downtown or 'loop district' of Chicago reputed to have a fair valuation of upward of $50,000,000." (R. 4, 5, 7); that the First Trust and Savings Bank of Chicago was named as Trustee (R. 7); that it and its successors, First Union Trust and Savings Bank, a consolidated corporation of the State of Illinois, and The First National Bank of Chicago, consolidated under an Act of Congress, the McFadden Act of 1927, have administered the trust since 1906 up to the present time. (R. 4.)

The Will provides that the trust income during the lives of the widow of Otto Young and his daughters is to be distributed in part to them and in part accumulated. Upon the death of each daughter and until the termination of the trust, the issue of such deceased daughter is to receive her share.

The trust is to terminate when the last survivor of the decedent's daughters shall have died and the youngest surviving child of his daughters shall have attained the age of twenty-one years.

The principal of the trust upon its termination is to be distributed to the decedent's grandchildren and the issue of any deceased grandchild. (Comp. Pars. 2-20; R. 4-13.)

As the objectives of the suit, plaintiff charged in the complaint: That the disposition in trust was invalid as in

conflict with the rule against perpetuities; that the estate sought to be devised "falls under the operation of the Illinois Statute of Descent, descends as intestate property, and vests in the heirs at law of the testator;" that the plaintiff is an heir of Otto Young and "as such is entitled to a distributive share of the testator's estate now held by the defendant, The First National Bank, as Trustee," (R. 13, 139), and entitled "to compel distribution of the testator's estate to himself and to the other heirs at law of the decedent as intestate property." (R. 13, 139.)

An alternative objective was to declare the trust valid and the plaintiff to be "issue" of his own son and, as such issue, a beneficiary of the trust. (R. 14, 139.) And also to declare the First National Bank of Chicago to be a Trustee *de son tort* as having no right or power to succeed to the trustee named in the Will, The First Trust and Savings Bank. (R. 16-19, 142-145.)

The prayer of the complaint asked the court:

To construe the Will of Otto Young and declare the devise in trust to be void as contravening the rule against perpetuities (R. 19);

To hold the corpus of the trust to be intestate property (R. 19);

To decree that it be divided and partitioned and distributed to the plaintiff and to the other heirs of the decedent in accordance with their interests as they might be made to appear under the Illinois Statute of Descent (R. 20);

To appoint a receiver and commissioner to take possession of the trust estate and make the division and distribution of it (R. 20);

To hold the plaintiff to be issue of his own son and thereby a beneficiary of the trust estate;

To declare the present Trustee to be acting *de son tort* and the trust vacant and appoint a new Trustee (R. 19).

It is to be noted that the beneficiaries of the trust are the decedent's wife, his four daughters, and their issue, that is, only and all such persons as are in the direct line of descent. On the other hand, the heirs of Otto Young as that word is used by the plaintiff now include many persons collateral to those in the direct line of descent.

In the thirty-eight year period between the death of Otto Young and the bringing of this suit, the widow and three of his daughters have died, and also a number of his grandchildren, and many other changes have occurred in the list of beneficiaries of the trust and the table of heirship.

(For an aid to an understanding of that situation, we have added as an appendix to this petition a Family Tree.)

It appears from the facts set up in the original complaint that there are five persons there named, each of whom, just as the plaintiff, is collateral to the direct line of descent, and has exactly the same interest as that claimed by the plaintiff in the subject matter of the suit. He claims as the surviving father of a deceased grandson of Otto Young to be one of the heirs entitled to the claimed intestate property under the Illinois statute. They also are heirs on the same line of reasoning with the same interest. And, if the trust provisions of the Will are held invalid, they are entitled to share in the property and to have it partitioned and distributed, just as he claims. (The Family Tree referred to graphically indicates these persons.) They are as follows:

First: Ruth Jacoby Young, who is the widow of Stanislaus Stephen de Korwin (otherwise known as Stanley Young), through whom the plaintiff claims. Stanley was the son of the plaintiff and Selma Cecile, one of the daughters of Otto Young. Sometime after his mother's death he died without issue and intestate, leaving his

widow, Ruth Jacoby Young. She stands in the same position as the plaintiff, as an heir of her husband and also, on the plaintiff's theory, the heir of her husband's grandfather, Otto Young. (R. 5, 6.)

Second: Ruth Jacoby Young, Administratrix of the Estate of Stanislaus Stephen de Korwin, through which plaintiff claims. (R. 3, 5, 6.)

Third: Lawrence Heyworth. He also was a husband of Selma Cecile and divorced from her. They too had a son, Otto Young Heyworth, (a half brother of Stanley), who, after his mother's death, died without issue and intestate.

Fourth: Evelyn Heyworth, the widow of Otto Young Heyworth. (R. 4, 5.)

Fifth: Lawrence Heyworth, Jr., a half brother of Otto Young Heyworth, the son of Lawrence Heyworth and his second wife. He too is an heir of Otto Young Heyworth and also an heir of Otto Young. (Par. 8, R. 6.)

Since there is no allegation in the complaint concerning the citizenship of these parties, they are presumed to be residents of the State of Illinois.

The amended complaint sought to be filed after the argument on jurisdiction, in an apparent effort to cure the defect, eliminated certain of the heirs of Otto Young as parties defendant, specifically those five mentioned above who the defendants claimed defeated diversity of citizenship jurisdiction. If these were indispensable parties, their dismissal could not cure that defect and there would still be no Federal jurisdiction.

The plaintiff in his original complaint named these defendants as heirs of Otto Young. They are all just as much Otto Young's heirs as the plaintiff claims to be. They all have the same interest as he.

It is the petitioners' position in this case:

These parties are indispensable to this litigation and their presence defeats diversity of citizenship.

That the question of indispensability of the parties in such a case as this is to be determined by the law of Illinois, not the Federal law, and that the decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of other circuits;

That the question being controlled by the Illinois law, the decision is in conflict with the decisions of the Supreme Court of Illinois;

That even assuming Federal law controls and not State law on this issue, the decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Supreme Court of the United States, and is also in conflict with the decisions of other Circuit Courts of Appeal.

OPINIONS BELOW.

There was no written opinion by Judge Shaw who entered the decree in the District Court.

The opinion of the Circuit Court of Appeals is reported in 158 Fed. (2d) 858, and is to be found at page 181 of the Record.

STATEMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347(a).

The decision of the Circuit Court of Appeals was rendered August 2, 1946. (R. 181, 188.)

Petition for rehearing duly filed was denied September 11, 1946. (R. 189.)

THE QUESTIONS PRESENTED.

This suit attacks the validity of an Illinois resident's will which disposed of real and personal property in Illinois. It charges: That under the Illinois Statute of Descent the property is intestate, and that the plaintiff and others are heirs of the decedent, and as such have together all of the rights of ownership in the property; and that they are entitled to have it partitioned and distributed among them. The question presented therefore is whether all of such heirs are indispensable parties to the litigation; and being so, upon realignment in accordance with their interest, diversity of citizenship does not exist.

And in this connection, in determining the question of the indispensability of parties, whether State or Federal law must control.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First: The Circuit Court of Appeals for the Seventh Circuit Has Rendered a Decision in This Case in Conflict With the Holding of Other Circuit Courts of Appeals on the Same Matter. This Conflict Is in the Holding That Federal and Not State Law Controls in Determining the Indispensable Parties to This Litigation Brought to Adjudicate Property Rights Created by the State Law.

The Circuit Court of Appeals for the Seventh Circuit in this case held:

> "Notwithstanding defendants' suggestion to the contrary, we think the rule as to the indispensability of parties must be determined by Federal rather than local rules." (R. 185.)

The Circuit Court of Appeals for the Eighth Circuit held to the contrary in *Young* v. *Garrett*, 149 Fed. (2d) 223. In that suit there was involved the title and right of possession in an undivided interest in land, and the objective sought was ejectment and the recovery of rents and profits and damages for injury to the freehold. And on the fundamental question presented, whether certain heirs of a deceased party in interest were indispensable parties to the litigation, the court said at page 227:

> "Before examining this issue as to indispensable parties, it is necessary to state which law governs —National or State. Where there are no specific national statutes (such as the provision as to assigned choses in action, Title 28 U. S. C. Sec. 41(1), 28 U. S. C. A. § 41(1)) or governing Rules, the Conformity Act (Title 28 U. S. C. Sec. 724, 28 U. S. C. A. § 724) applies and State law controls.

And at page 228:

> "In respect to who are indispensable parties, this Rule is declaratory of the Law (Equity Rule 37, 28 U. S. C. A. § 723 Appendix) as it existed before the Rule. Before the Rule, indispensability of parties depended upon State Law."

The Eighth Circuit also had before it, in an earlier case involving a will contest, the same question as to indispensable parties, *Thomson* v. *Butler*, 136 Fed. (2d) 644, (certiorari denied, 320 U. S. 761). The court said, at page 646:

> "The trial court properly held that the necessary diversity of citizenship was lacking to give a federal court jurisdiction on that ground. Frank Bush, one of the legatees under the will, was a resident of the same state as some of the plaintiffs. Plaintiffs apparently had sought to escape this difficulty by not making him a party to the suit. Under the law of Missouri, however, all devisees and legatees are necessary parties to a will contest."

This court has held in cases involving some of the other and clearly related fundamental requirements upon which Federal jurisdiction is based, that State law controls in determining whether such requirements are satisfied.

Bell v. *Preferred Life Society*, 320 U. S. 238. In an action charging fraudulent misrepresentation and claiming actual damages amounting to only $1,000, and punitive damages in a much larger sum, this court held that the question of jurisdictional amount was to be determined by the State law where the cause of action arose. And since that State law gave the right to recover punitive damages in addition to actual damages, the requirement was satisfied that $3,000 be involved.

Taylor v. *Anderson*, 275 U. S. 431. The Illinois Practice Act with reference to suits by assignees was held to

govern the right of the plaintiff to sue in the District Court.

To the same effect:

Delaware County v. *Diebold Safe Co.*, 133 U. S. 473.

Lyeth v. *Hoey*, 305 U. S. 188 (1938). Here, the court in an income tax case held at page 193:

> "Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated."

See also *Cities Service Co.* v. *Dunlap, et al.*, 308 U. S. 208.

The Federal Rules of Civil Procedure which expressly disclaim any purpose of affecting jurisdiction (Rule 82 and the Enabling Act U.S.C.A. Par. 723(b) and (c)) provide what persons are to be made parties to a suit, as follows:

> "Rule 19. Necessary Joinder of Parties.
> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants."

What persons have a joint interest in the subject matter of the suit and the nature of that interest and whether the interest is held by them in common, can only be determined from the same source that creates the interest.

In this case the plaintiff asserts that the source of his interest in the alleged intestate property of the decedent is the Illinois Statute of Descent which specifies the persons who are to have property rights in the intestate property, and in what proportion. That statute is the sole authority for the rights claimed in this case. The rights thus created in the heirs of the decedent to his in-

testate property are joint rights in common. The Supreme Court of Illinois has so held. *Updike* v. *Smith,* 378 Ill. 600, 603.

So that on the strength of the rule promulgated by this court for the District Court, the question who are the persons who shall be made parties, who are the indispensable parties to a suit involving rights created by a State statute, the law of that State must control.

Second: The Question of Indispensable Parties Here Involved Being Governed by the Law of Illinois, the Circuit Court of Appeals for the Seventh Circuit in Holding That Certain Heirs of Otto Young, Deceased, Were Not Indispensable Parties to This Litigation, Has Decided an Important Question of Local Law in Direct Conflict With the Illinois Decisions.

Riley v. *Webb,* 272 Ill. 537. In a suit to set aside an instrument purporting to be a will of the decedent with the attendant result of taking the property from the legatees and distributing it to the heirs of the decedent under the Illinois Statute of Descent, one of the heirs, who was not a legatee, was made a party but not served with process. The will having been held valid, plaintiff moved to vacate the decree because of the absence of the heir mentioned. The Supreme Court of Illinois held that the heir was an indispensable party whether the will be held valid or invalid, saying at page 538:

> "William Riley, one of the defendants in the bill, was a brother of the testator and had a substantial interest in the subject matter of the suit. He was not only a proper but a necessary party. It is a rule in equity that all persons who have any substantial legal or beneficial interest in the subject matter in litigation and who will be materially affected by the decree must be made parties."

And at page 539:

> "It is no answer to say that William Riley was not interested in sustaining the will; that his interests were with the contestants; and that when the decree was entered dismissing the bill the time had gone by in which he could have brought a suit to contest the will. If appellant had proceeded to trial when the issue was submitted to the jury and if he had succeeded in obtaining a verdict finding that the instrument in controversy was not the will of Thomas H. Riley, any of the defendants to the bill, or the court upon its own motion, could have prevented the entry of a decree upon that verdict; or, in case a decree had been entered on the verdict, any of the defendants to the bill could have had such decree set aside by the chancellor during the term of court at which it was entered, or reversed upon appeal or writ of error, on the ground that William Riley had not been served with summons and had not entered his appearance."

Walker v. *Cook*, 294 Ill. 294. A court order admitting a will to probate, although some of the heirs who were not legatees were not named in the proceeding, was held void. The court held at page 299:

> "An heir-at-law is made such by the laws of descent, and his rights should not be taken from him without notice and an opportunity to have his day in court."

McCreery v. *Bartholf*, 305 Ill. 325. This was a will contest in which the court said as to indispensable parties at page 327:

> "It is true that it was necessary for Louis McCreery to make parties all persons who had any substantial legal or beneficial interest in the will of John H. McCreery and who would be materially affected by a decree entered in a suit to contest that will. (*Brown* v. *Riggin*, 94 Ill. 560; *Riley* v. *Webb*, 272 id. 537.) Appellant was a necessary party, and if the original complainant had failed to name him as a defendant, it

> would have been the duty of the court, as soon as it learned of the situation, to make him a party. (*McMechan* v. *Yenter*, 301 Ill. 508.) The reason for this rule is apparent. When all the necessary parties are before the court the whole case may be considered and all interests protected, and the court is enabled to make a complete decree binding on all parties who have a substantial beneficial interest in the subject matter of the litigation and thereby dispose of the whole cause."

See also *Oglesby* v. *Springfield Marine Bank*, 385 Ill. 414; *Hauser* v. *Powers*, 351 Ill. 36; *Brown* v. *Riggin*, 94 Ill. 560; *Rodisch* v. *Moore*, 253 Ill. 296; *Hayden* v. *McNamee*, 392 Ill. 99 (1945); *Giese* v. *Terry*, 388 Ill. 188.

State Life Insurance Co. v. *Board of Education*, 394 Ill. 301, 309, 310, holds that in a controversy involving the distribution of a common fund, all persons in interest are indispensable parties.

Third: If the Question of Indispensable Parties Is to be Governed by Federal Law, Then the Circuit Court of Appeals In This Case Has Decided an Important Question of Federal Law In a Way In Conflict With the Applicable Decisions of This Court.

(In these decisions no question was raised as to which law governed, State or Federal.)

Barney v. *Baltimore City*, 6 Wallace (73 U. S.) 280. This court held in a suit having for its objective the partitioning and distribution of real estate alleged to be intestate property, that all of the heirs of the decedent were indispensable parties to the litigation. The court said (284):

> "And there is a third class, whose interests in the subject-matter of the suit, *and in the relief sought*, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot pro-

> ceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction." (Italics ours.)

And then concluded, at page 287:

> "We are, therefore, of opinion that the Circuit Court could render no decree on the merits of this case, without having rightfully before it some person representing the interest of the Ridgelys." (The absent heirs.)

The principle as stated has been reaffirmed many times by this court. For example, the case quoted from and relied upon by the Circuit Court of Appeals in its decision (R. 185), *Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77, where this court said, in defining indispensable parties, at page 80:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The assumption of jurisdiction and entry of any decree in this case without all the heirs of the decedent being present would be in direct conflict with these decisions. The issue in this suit is which of two groups of persons is entitled to share in this large trust property—the beneficiaries of the trust under the Will of Otto Young by virtue of the Illinois Statute of Wills (Illinois Revised Statutes 1905, Chap. 148 § 1, or the heirs of Otto Young claiming the property to be intestate and their interests and proportionate shares to be established by the Statute of Descent of the State of Illinois. (Illinois Revised Statutes 1905, Chap. 39, § 1.)

On such an issue no decree could be entered in the absence of any one of the heirs or beneficiaries "without

either affecting that interest" of any absent heir or beneficiary, or "leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (*Niles-Bement-Pond Co.* v. *Iron Moulders Union Local No. 68, et al.*, 254 U. S. 77; *Barney* v. *Baltimore City*, 6 Wall (73 U. S.) 280.)

The plaintiff's interest is in common with all other heirs. And a decree, as suggested by the court below, in the absence of any one of them, adjudging either that the plaintiff had no interest, or had an interest and not saying what should be done with it, would not be a determination of the litigation. Such a decree would not be binding on the other heirs who were absent; and, because of the principle of mutuality, would not be binding on the beneficiaries in any other suit where such absent heirs are present. In any subsequent litigation by the plaintiff to realize on the interest he might be found to have in this case, the whole matter would have to be litigated over again. This court in the *Barney* case, *supra*, (6 Wallace (73 U. S.) 280) said (P. 285):

> "This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit, and in the account which is asked for, of rents and profits. If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties.
>
> "If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree

> to which they are not parties. The same observations apply to any account stated by the court, of rents and profits, and to any decree settling the amount due on that score."

The only distinction suggested by the Circuit Court of Appeals in our case was (R. 187):

> "We have not overlooked defendants' argument that this is a partition suit. True, the complaint does ask for a partition and division of the trust estate as part of the relief prayed for. This is but incidental, however, to the main purpose of the suit which is the construction of the will of Otto Young. The prayer for the partition may properly be treated as surplusage."

But the absent heirs would not be bound by any construction of the Will of Otto Young. Moreover, both the original and amended complaint assert that by reason of the claimed invalidity of the Will of Otto Young, the plaintiff, is his heir and "as such * * * is entitled to a distributive share of the testator's estate now held by the defendant" and "*to compel distribution* of the testator's estate *to himself and to the other heirs at law* of the decedent as intestate property." (R. 13, 139.) (Italics ours.)

The prayer for relief asks that the trust property be held intestate property, that it "falls under the Statute of Descent of Illinois and must be distributed to the plaintiff and the other heirs at law of Otto Young, deceased, in accordance with their interests as they are fixed by such statute." (R. 19, 20, 145.) And that "the court may direct that the trust estate * * * *be divided and partitioned and distributed as intestate property* to plaintiff and *the other heirs at law* of such decedent in accordance with *their interests as they may be made* to appear under the *Illinois Statute of Descent*." (R. 20, 145.) And "that the court in this connection may appoint a receiver and commissioner to take possession of such trust estate and to make division and distribution thereof." (Italics ours.)

"One of the tests of jurisdiction is the relief prayed for in the complaint, or the subject of the suit." (*Winger* v. *Chicago Bank and Trust Co.*, 394 Ill. 94.)

See *Pomeroy's Equity Jurisprudence*, 5th Edition, Vol. 4, Sec. 1316, 1378.

See *American Jurisprudence*, Vol. 19, Equity, Sec. 17, Page 48.

The Supreme Court in the following cases has held that in litigation involving rights under a contract each party to the contract is an indispensable party to the litigation and that the litigation can not proceed to a decree without him.

Shields v. *Barrow*, 17 Howard (58 U. S.) 130.
Gregory v. *Stetson*, 133 U. S. 579.
Commonwealth Trust Co. v. *Smith*, 266 U. S. 152.

The Circuit Court of Appeals in our case held these cases inapplicable, saying (R. 186):

"We are of the opinion that the cases cited by defendants in support of their position as to the indispensability are inapplicable to the facts of this case. Those cases treat of controversies involving contracts or suits for partition and none involve the construction of a will or actions against an estate."

As though there could be any distinction in the protection of rights, property or otherwise, accorded by the law, as between rights arising from contract and rights arising from a trust instrument or a will.

The cases cited in the decision of the Circuit Court of Appeals, namely *Horn* v. *Lockhart*, 84 U. S. 570, *Payne* v. *Hook*, 74 U. S. 425, and *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, do not overrule, but on the contrary reaffirm the principles laid down in the *Barney* case (73 U. S. 280). The facts and the issues in those suits were such that the interest of the parties was not an interest in com-

mon, so that the plaintiff's claim was with respect to a definite part of a fund which could be segregated, and a decree could be entered without affecting in any way the rights of the absent parties.

Fourth: If the Question of Indispensable Parties Is to be Governed by Federal Law, Then the Circuit Court of Appeals In This Case Has Decided an Important Question of Federal Law In a Way In Conflict With Decisions of Other Circuit Courts of Appeal. This Conflict Is in the Holding That in a Case Such as This to Contest a Will and to Partition and Distribute the Decedent's Property as Intestate, Each of the Decedent's Heirs Is Not an Indispensable Party.

In the following cases the Circuit Courts of Appeal named have held in conflict with this decision. (No question was raised in these cases as to which law governed, State or Federal.)

Berg v. *Merchants,* 15 Fed. (2d) 990, 6th Circuit, (certiorari denied, 274 U. S. 738). In this action to contest a will, some of the heirs who were not beneficiaries were not parties. The court held them to be indispensable.

Crutcher v. *Joyce,* 134 Fed. (2d) 809, 10 Circ. (1943). The court holds that heirs though not beneficiaries were indispensable parties in such a case.

Baird v. *Peoples Bank & Trust Co.,* 120 Fed. (2d) 1001, (3rd C. C. A. 1941). This case involved the construction of a testamentary trust. All beneficiaries, present and contingent, were held by the court to be indispensable.

Grisso v. *U. S.,* 138 Fed. (2d) 996, 10th Circuit, 1943. In a suit to determine who was entitled to a certain piece of land and to partition it among those held to be the owners, the court held that the heirs of a decedent were indispensable parties.

Kendrick v. *Kendrick*, 16 Fed. (2d) 744, 5th Circuit, 1926, certiorari denied, 273 U. S. 758. This was a suit by one heir on behalf of others who were absent to determine ownership of real estate by virtue of a testamentary provision. The court held that heirs are indispensable parties.

Fifth: A Review of This Case Is Fundamental to the Further Conduct of the Case.

This reason is advanced in accord with *United States* v. *General Motors*, 323 U. S. 373, 377:

> "We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case."

This reason for granting certiorari is particularly pertinent to a case where the fundamental question involved is one of jurisdiction.

If the decision of the Circuit Court of Appeals is allowed to stand, there must follow a trial by the District Court of the many complicated questions of law and fact involving the interest of many persons in a large diversified property—a fruitless procedure if jurisdiction does not exist.

As illustrative, we refer to the history of the case cited above, *Indianapolis* v. *Chase National Bank*, 314 U. S. 63. There, jurisdiction was originally denied by the District Court (1937). The Circuit Court of Appeals reversed and held that the District Court did have jurisdiction, 96 Fed. (2d) 363, April 1938. Petition for certiorari to this court was denied, 305 U. S. 600, October 1938. The case was remanded and tried on its merits and a decree entered in the District Court. On appeal the Circuit Court of Appeals reversed in part, 113 Fed. (2d) 217, June 1940. Petitions for certiorari were allowed by this court to review the decree, (311 U. S. 636, 637) and upon review in No-

vember 1941, this court held there was no Federal jurisdiction (314 U. S. 63).

This same pattern could result in the instant case from a denial of certiorari at this point.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8924, Margaret de Korwin, individually, and as Executrix of the Will of Joseph Maria de Korwin, Deceased, Plaintiff-Appellant, *vs.* The First National Bank of Chicago, etc., *et al.*, Defendants-Appellees, and that the judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE FIRST NATIONAL BANK OF CHICAGO,
Individually and as Trustee of the
Testamentary Trust of Otto Young,
Deceased,

By J. F. DAMMANN,

WILLIAM B. MCILVAINE, JR.,

GWENDOLYN YOUNG HEYWORTH KOCH,

By CRANSTON SPRAY,

Her Attorney.

MARIE JULIA YOUNG KAUFMAN PRATT,
OTTO YOUNG KAUFMAN,
OTTILIE WICKES COCHRAN,
BETTY WICKES SAGE,
NANCY WICKES SHAW,
WALTER F. WICKES, JR.,
CATHERINE YOUNG WICKES, and
JOHN WILLIAM YOUNG MARTIN,

By DAVID A. WATTS,
Their Attorney.

Of Counsel:

WILSON & MCILVAINE,
120 West Adams Street,
Chicago, Illinois.

SCOTT, MACLEISH & FALK,
134 South La Salle Street,
Chicago, Illinois.

BELL, BOYD & MARSHALL,
135 South La Salle Street,
Chicago, Illinois.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 13 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 696.

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its Individual Capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN, *Petitioners*,

v.

MARGARET DE KORWIN, Individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, *Respondents*.

REPLY BRIEF OF THE PETITIONERS TO THE REPLIES OF THE RESPONDENT AND GUARDIAN AD LITEM.

J. F. DAMMANN,
WILLIAM B. McILVAINE, JR.,
Attorneys for The First National Bank of Chicago.
CRANSTON SPRAY,
Attorney for Gwendolyn Young Heyworth Koch.
DAVID A. WATTS,
Attorney for Marie Julia Young Kaufman Pratt, Otto Young Kaufman, Ottilie Wickes Cochran, Betty Wickes Sage, Nancy Wickes Shaw, Walter F. Wickes, Jr., Catherine Young Wickes, and John William Young Martin.

Of Counsel:
WILSON & McILVAINE,
120 West Adams Street,
Chicago, Illinois.
SCOTT, MacLEISH & FALK,
134 South La Salle Street,
Chicago, Illinois.
BELL, BOYD & MARSHALL,
135 South La Salle Street,
Chicago, Illinois.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Jurisdiction of This Court	1
As to the Charge that the Record in this Case has been Distorted and Misrepresented	4
As to Respondent's Contention that there is no Conflict in Decisions of the Circuit Courts of Appeals on the Proposition that Federal and Not State Law Controls in Determining Indispensable Parties..	5
As to the Respondent's Contention that the Law of Illinois does not Make the Heirs in such a Case Indispensable Parties	6
The Alleged Federal Question	6
As to the Claimed Class Suit	9
As to the Amended Complaints	9

AUTHORITIES CITED.

Forsyth v. Hammond, 166 U. S. 506	2
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117..	2
United States v. General Motors, 323 U. S. 373	2
George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489	2
Di Giovanni v. Camden Insurance Co., 296 U. S. 64..	3
Brotherhood v. Pinkston, 293 U. S. 95	3
Stringfeller v. Atlantic Coast Line, 290 U. S. 322....	3
United States v. Gulf Refining Co., 268 U. S. 542....	3
Fairmount Glass Works v. Coal Co., 287 U. S. 474....	3
Gay v. Ruff, 292 U. S. 25	3
Armstrong Co. v. Nu-Enamel Corporation, 305 U. S. 315	3
Slaker, Administrator v. O'Connor, 278 U. S. 188....	3
Martinez v. International Banking Corporation, 220 U. S. 214, 223	3
Drake v. Kochersperger, 170 U. S. 303	3
Clark v. Kansas City, 172 U. S. 334	3
Chicago & Northwestern Ry. Co. v. Osborne case, consolidated with The Chicago & Northwestern Ry. Co. v. Junod, 146 U. S. 354, 355	4

Page

Kingman & Co. v. Western Manufacturing Company, 170 U. S. 675 4
George A. Fuller & Co. v. Otis Elevator Co., 245 U. S. 489 (supra) 4
Lau Ow Bew, 141 U. S. 583 4
The Conqueror, 166 U. S. 110 4
The Three Friends case, 166 U. S. 1 4
Forsyth v. Hammond, 166 U. S. 506 4
Joyal v. Pillotte, 293 Ill. 377, 381..... 5
Young v. Garrett, 149 Fed. (2d) 223 5
Thomson v. Butler, 136 Fed. (2d) 644 5
First Trust and Savings Bank v. Iowa-Wisconsin Bridge Company, 98 Fed. (2d) 416, 420 6
Erie v. Tompkins, 304 U. S. 64 6
Ruhlin v. New York Life Insurance Company, 304 U. S. 202 6
Guaranty Trust Company v. York, 326 U. S. 99 6
Pennsylvania Company v. Bauerle, 143 Ill. 459, 462.. 6
Chicago Title and Trust Company v. Zinzer, 264 Ill. 31 6
Bankers Trust Co. v. Texas & Pacific R.R. Co., 241 U. S. 295 8
Federal Land Bank Co. of Omaha and New Amsterdam Casualty Co. v. United States National Bank of Omaha, 8th Circuit, 13 Fed. (2d) 36 8
Denicke v. Brigham, 142 Fed. (2d) 221, 9th Circuit.... 8
Ex Parte Worcester County National Bank, 279 U. S. 347 8
Water Service Co. v. Redding, 304 U. S. 252 8
Alabama Power Co. v. Ickes, 302 U. S. 464 8
Levering & Garringues Co. v. Morrin, 289 U. S. 103.. 8
Chicago Title and Trust Company v. Zinzer, 264 Ill. 31 9
Hansberry v. Lee, 311 U. S. 32 9
Minnesota v. Northern Securities Co., 184 U. S. 199, 246 9
Arizona v. California, 298 U. S. 558, 572 9
Alabama v. Arizona, 291 U. S. 286, 291, 292 9
Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 445 9
Rules of Civil Procedure, Rule 19(b), 82 10
Cyclopedia of Federal Procedure, 2nd Edition 1898, Vol. 5, p. 626 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 696.

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its Individual Capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN, *Petitioners*,

v.

MARGARET DE KORWIN, Individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, *Respondents.*

REPLY BRIEF OF THE PETITIONER TO REPLIES OF THE RESPONDENT AND OF HOWARD D. MOSES, GUARDIAN AD LITEM FOR CERTAIN MINOR TRUST BENEFICIARIES.

Jurisdiction of This Court.

In the reply of Howard D. Moses, Guardian ad Litem, to the petition for certiorari, it is contended that this court has no jurisdiction to issue a writ of certiorari in this case, since the judgment of the Circuit Court of Appeals reversing and remanding the cause to the District Court is not a final judgment.

This is a confusion of terms. With reference to the obligatory jurisdiction of this court, in cases on appeal and

writ of error (Section 240(*b*) of the Judicial Code, as amended February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347(*b*), and Sec. 237(*a*) of the same act (28 U. S. C. A. 344(*a*)), it is elementary that the judgment appealed from must be final, that is, a final disposition of the case.

While with reference to the discretionary jurisdiction of this court to issue the writ of certiorari, (Section 240 of the same statute, paragraph (*a*)), 28 U. S. C. A. 347(*a*), there is no such requirement.

The following decisions of this court directly confirm this statement.

Forsyth v. *Hammond*, 166 U. S. 506, held there was no lack of power in this court to grant a writ of certiorari where the judgment of the Circuit Court of Appeals does not finally dispose of the matter but remands it to the District Court for further proceedings; the question presented being solely addressed to the discretion of the court.

Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117. In this consolidated case a number of judgments having been entered, they were taken to this court by writ of error. Later a petition for writ of certiorari was filed. This court dismissed the writs of error, holding that it was elementary that the writ would lie to review final judgments only. But the writ of certiorari was issued.

United States v. *General Motors*, 323 U. S. 373, was a condemnation case in which the District Court denied the introduction of certain evidence. The Circuit Court of Appeals reversed and remanded for further proceedings. This court granted certiorari to review a question that was fundamental to the further conduct of the case. (Also cited in our petition, page 21)

George A. Fuller Co. v. *Otis Elevator Co.*, 245 U. S. 489 (1918). The Circuit Court of Appeals reversed a judgment of the District Court and remanded for further proceedings. On petition for writ of certiorari it was objected that this court had no jurisdiction as the judgment was not final. The court held that (p. 492): "the writ when

issued to the Court of Appeals is not limited to cases in which a final judgment has been entered but only to cases in which the judgment when entered is final," that is, "when a writ of error or appeal does not lie."

Di Giovanni v. *Camden Insurance Co.*, 296 U. S. 64. The sole question was whether or not the jurisdictional limitation as to amount was satisfied. The Circuit Court of Appeals holding that the limitation was satisfied reversed the District Court and remanded the case for further proceedings. This court granted certiorari "to settle an important question of Federal law affecting the jurisdiction of the Federal Courts." (P. 66)

In *Brotherhood* v. *Pinkston*, 293 U. S. 95, there was the same situation and the writ was issued.

The following cases are a few of the many other cases in which writs of certiorari were issued to review Circuit Court of Appeals judgments which reversed and remanded the cause to the District Court for further proceedings.

Stringfeller v. *Atlantic Coast Line*, 290 U. S. 322
United States v. *Gulf Refining Co.*, 268 U. S. 542
Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474
Gay v. *Ruff*, 292 U. S. 25
Armstrong Co. v. *Nu-Enamel Corporation*, 305 U. S. 315.

For further summary of pertinent cases, see Robertson's Practice and Procedure in the Supreme Court of the United States, Paragraph 7, Page 8, and Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States, Paragraph 282, Section 308, Page 623.

The cases cited by the guardian ad litem do not support his statement.

Slaker, Administrator v. *O'Connor*, 278 U. S. 188, deals not with certiorari but with an appeal under Paragraph (b) of Section 240.

Martinez v. *International Banking Corporation*, 220 U. S. 214, 223, *Drake* v. *Kochersperger*, 170 U. S. 303, and *Clark*

v. *Kansas City*, 172 U. S. 334, are also appeal or writ of error cases.

The *Chicago & Northwestern Ry. Co.* v. *Osborne* case, consolidated with *The Chicago & Northwestern Ry. Co.* v. *Junod*, 146 U. S. 354, 355, was a certiorari case in which the judgment was not final, but there was no other reason for allowing the writ; which is merely another way of saying that this court will not exercise its discretion to issue the writ when no adequate reason is advanced for doing so.

Kingman & Co. v. *Western Manufacturing Company*, 170 U. S. 675. This case merely holds that it was one in that class of cases in which "the judgments of the Circuit Court of Appeals were made final," (P. 677) and is, therefore, in accord with the case cited above, *George A. Fuller & Co.* v. *Otis Elevator Co.*, 245 U. S. 489 (*supra*).

Lau Ow Bew, 141 U. S. 583, is not in point for the same reason.

There are three cases appearing in Volume 166 U. S. decided at the same term of this court, that are clearly indicative.

The Conqueror, 166 U. S. 110. This court held that certiorari is ordinarily issued after a final decree, but that it may be issued before, if this court be of the opinion that the facts of the case require an earlier interposition. (P. 113)

In *The Three Friends* case, 166 U. S. 1, the writ was issued for the same reason.

And in *Forsyth* v. *Hammond*, 166 U. S. 506 (cited above), the court reviews the other cases and repudiates counsel's contention in this case.

As to the Charge that the Record in this Case has been Distorted and Misrepresented.

The respondent in his reply (page 1) contends that the record has been "distorted and misrepresented" in this case.

The Illinois Statute with reference to the contest of wills cited by counsel for the respondent, 1945 Revised Statutes, Chapter 3, Section 243, (see also Jones Illinois Statutes Annotated, 110.340, also .339) relates to the statutory contest of a will where the issue *is whether the instrument produced is the will of the testator. Joyal* v. *Pillotte,* 293 Ill. 377, 381.

The case at bar is not a suit to contest the will of Otto Young in that sense. It has never been so contended. If it had been so contended, the will having been probated in 1907 (R. 7) the cause would have been outlawed in February 1908, or approximately thirty-five years before this suit was brought. No where was that contention made in the complete answers filed by the Petitioners. (R. 36) Nor is the contention found at any point in the petition for certiorari.

The attack which the respondent makes on the Otto Young will in the instant case is that the provisions of the testamentary trust "are void" (R. 12) and that "the entire disposition" (of the residuary clause of the will) "is void" (R. 13, 19). He invokes the Illinois Statute of Descent on the ground that the property is accordingly intestate. It is that statute which creates the rights in common in the heirs of the decedent with reference to intestate property. And it is those rights which can not be taken away or adjudicated in the absence of any one of the heirs in whom the rights are created.

As to Respondent's Contention that There is no Conflict in Decisions of the Circuit Courts of Appeals on the Proposition that Federal and Not State Law Controls in Determining Indispensable Parties.

The respondent's answer to petitioners' assertion that State law controls asserts a distinction in the decisions of the Eighth Circuit in the fact that those cases were law and not equity cases. *Young* v. *Garrett,* 149 Fed. (2d) 223, (erroneously cited by respondent as 14 Fed. (2d) 223); *Thomson* v. *Butler,* 136 Fed. (2d) 644.

He then cites *First Trust and Savings Bank* v. *Iowa-Wisconsin Bridge Company,* 98 Fed. (2d) 416, 420, wherein the same circuit held that the Federal Rules governed, as the Conformity Act of 1872 is not applicable to equity causes.

In that decision no reference was made to the *Erie* case (*Erie* v. *Tompkins,* 304 U. S. 64) or the *Ruhlin* case (*Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202), which were decided some three months before. And in the cases subsequently decided, above cited by the petitioners, there is no reference to *First Trust and Savings Bank* v. *Iowa-Wisconsin Bridge Company,* 98 Fed. (2d) 416.

But meanwhile that question has been finally decided by this court in the case of *Guaranty Trust Company* v. *York,* 326 U. S. 99, which held that the doctrine announced in the *Erie* case applies also to equity causes, and that State law controls in such causes.

As to the Respondent's Contention that the Law of Illinois does not Make the Heirs in such a Case Indispensable Parties.

The respondent cites *Pennsylvania Company* v. *Bauerle,* 143 Ill. 459, 462, for this proposition. In this case there was no contention that any part of the will was invalid. The will stood unattacked. The sole issue was as to its meaning. The legatees were the only parties in interest. In addition to the paragraph quoted by the respondent, the Supreme Court of Illinois said: (P. 479)

> "We are unable to see what interest the heirs can have in the matter. * * * No part or parcel of the residuary estate, or of its proceeds, can, under any interpretation that can be placed upon the provisions of the will, be regarded as intestate property."

The Alleged Federal Question.

Both the respondent and the guardian ad litem contend that the judgment of the Circuit Court of Appeals is sustainable on the ground that there is involved a Federal question, and also a class suit.

It is stated by the respondent, without any basis, that the petitioners admit that the complaint states a good class suit and that a Federal question is presented. (P. 8)

Both of these points were urged by respondent and contested by the petitioners, but neither of them were passed upon by the Circuit Court of Appeals which only decided the question of jurisdiction on the ground of diversity of citizenship. Consequently our petition for writ of certiorari to correct that error did not involve either of the other two points.

But in view of counsel's contention that the judgment of the Circuit Court of Appeals is sustained by both propositions, we desire to point out here that there is neither a Federal question involved nor a class suit.

The alleged Federal question is said to grow out of the following facts:

The Trustee originally named in the Will was First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois (R. 16); on February 11, 1929, that corporation was consolidated with Union Trust Company, an Illinois corporation, and the consolidated company changed its name to First Union Trust and Savings Bank, an Illinois corporation (R. 17). On July 17, 1933, First Union Trust and Savings Bank was consolidated into and merged with The First National Bank of Chicago, a national banking institution, pursuant to approval of the Auditor of Public Accounts of the State of Illinois, and a certificate of consolidation issued by the Comptroller of Currency of the United States. (Comp. R. 18; Amended Complaint, R. 142)

Certainly no Federal question arises on the first consolidation of the two Illinois corporations. In fact, that consolidation was proper under the law of Illinois. *Chicago Title and Trust Company* v. *Zinzer*, 264 Ill. 31.

The respondent charges that the last consolidation being accomplished and authorized by the National Banking Act, known as the McFadden Act of 1927, a Federal question

arose as to whether the consolidated bank had the power or authority to succeed to the trusteeship in the Otto Young Estate formerly exercised by its predecessors, First Trust and Savings Bank and First Union Trust and Savings Bank.

No Federal question arises out of those facts.

The McFadden Act of 1927 (12 U. S. C. A. Sec. 34(a)) makes provision for consolidation of a State Bank with a National Bank. The consolidation in this case with The First National Bank of Chicago under the McFadden Act does not give the Federal Court jurisdiction.

An Act of Congress so provides. (Title 28 U. S. C. A. Sec. 42)

Bankers Trust Co. v. *Texas & Pacific R. R. Co.*, 241 U. S. 295
Federal Land Bank Co. of Omaha and New Amsterdam Casualty Co. v. *United States National Bank of Omaha*, 8th Circuit, 13 Fed. (2d) 36
Denicke v. *Brigham*, 142 Fed. (2d) 221, 9th Circuit, (certiorari denied, 323 U. S. 729, 816)

The McFadden Act in *Ex Parte Worcester County National Bank*, 279 U. S. 347, was upheld as constitutional on the ground that the challenged provisions authorizing a bank incorporated or consolidated under the Act to succeed to trusteeship of its predecessor, was not directory but merely permissive; and that being permissive, *the right of succession would depend upon the State law.*

That question having been decided by this court no longer furnishes the ground for Federal jurisdiction.

Water Service Co. v. *Redding*, 304 U. S. 252.
Alabama Power Co. v. *Ickes*, 302 U. S. 464.
Levering and Garrigues Co. v. *Morrin*, 289 U. S. 103.

The only remaining question on this issue is a State law question, namely, whether the Illinois State Law would permit the institution consolidated or incorporated under the McFadden Act to succeed to the trusteeships of its predeces-

sor. This must necessarily have been answered upon the consolidation of the two State banking corporations prior to the McFadden Act consolidation and would again be authorized under the same decision, *Chicago Title and Trust Company* v. *Zinzer*, 264 Ill. 31.

Hence, there is no Federal question here involved.

As to the Claimed Class Suit.

The contention has no validity. The suit clearly falls outside of the principles of philosophy of the class suit as set forth in Rule 23 of the Rules of Civil Procedure. The class is not so numerous as to make it impractical to bring all of its members before the court. In fact, they were actually made parties and brought before the court prior to the time the jurisdictional question was raised. And the absent ones are not fairly represented by those who bring the suit.

Hansberry v. *Lee*, 311 U. S. 32.

As to the Amended Complaint.

It is contended by respondent's counsel (pages 8, 9) that the amended complaint sought to be filed below was for the purpose of correcting a technical defect with reference to the citizenship of the parties defendant. In fact the amended complaint sought to correct the jurisdictional defect complained of by striking out the indispensable parties defendant in question. The District Court was under no obligation to perform the futile act of allowing the amended complaint to be filed which did not correct that jurisdictional defect. (R. 128)

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 246.

Arizona v. *California*, 298 U. S. 558, 572.

Alabama v. *Arizona*, 291 U. S. 286, 291, 292.

Georgia v. *Pennsylvania Railroad Co.*, 324 U. S. 439, 445.

Rules of Civil Procedure, Rule 19(b), 82.
Cyclopedia of Federal Procedure, 2nd Edition, § 1898, Vol. 5, P. 626.

For the same reason the contention of the guardian ad litem as to its counterclaim is of no validity.

Respectfully submitted:

THE FIRST NATIONAL BANK OF CHICAGO,
Individually and as Trustee of the Testamentary Trust of Otto Young, Deceased,

By: J. F. DAMMANN,
WILLIAM B. MCILVAINE, JR.
Its Attorneys.

GWENDOLYN YOUNG HEYWORTH KOCH,

By: CRANSTON SPRAY,
Her Attorney.

MARIE JULIA YOUNG KAUFMAN PRATT,
OTTO YOUNG KAUFMAN,
OTTILIE WICKES COCHRAN,
BETTY WICKES SAGE,
NANCY WICKES SHAW,
WALTER F. WICKES, JR.,
CATHERINE YOUNG WICKES, and
JOHN WILLIAM YOUNG MARTIN,

By: DAVID A. WATTS,
Their Attorney.

Of Counsel:

WILSON & MCILVAINE,
120 West Adams Street,
Chicago, Illinois.

SCOTT, MACLEISH & FALK,
134 South La Salle Street,
Chicago, Illinois.

BELL, BOYD & MARSHALL,
135 South La Salle Street,
Chicago, Illinois.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 5 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its individual capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET de KORWIN, individually, and as Executrix of the Will of Joseph Maria de Korwin, Deceased,

Respondents.

REPLY OF HOWARD D. MOSES, GUARDIAN AD LITEM, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HOWARD D. MOSES,
Attorney Per Se,

CHARLES G. CULVER,
Attorney for Howard D. Moses,
Guardian ad Litem.

Of Counsel:
ADAMS, MOSES & CULVER,
231 South La Salle Street,
Chicago, Illinois.

Scheffer Printing Company, Del. 7171

INDEX.

	PAGE
Argument	6
Conclusion	14
Jurisdiction of this Court	3
Propositions of Law Relied on	4
Statement	2

Table of Cases Cited.

Chicago & Northwestern Ry. Co. v. Osborne; Chicago & Northwestern Ry. Co. v. Junod, 146 U. S. 354, 355	8
Clark v. Kansas City, 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. Rep. 207	7
Drake v. Kochersperger, 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 942	7
Ginsburg v. Pacific Mutual Life Insurance Company of California, 69 Fed. (2d) 97, 98	13
Goldstone v. Payne, 94 Fed. (2d) 855, 857	13
Jefferson v. Gypsy Oil Co., 27 Fed. (2d) 304, 305, 306	11
Johnson v. Umstead, et al., (C. C. A.) 64 Fed. (2d) 316	12
Kingman & Company v. Western Manufacturing Company, 170 U. S. 675, 42 L. Ed. 1192	8
Martinez v. International Banking Corporation, 220 U. S. 214, 223	7
Merchants Heat & Light Co. v. James B. Clow & Sons, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488	13
Metropolitan Holding Co. v. Snyder, 70 Fed. (2d) 263, 268	12

PAGE

Table of Cases Cited (continued):

Slaker, Administrator, v. O'Connor, 49 S. Ct. 158, 278 U. S. 188, 73 L. Ed. 258 7

Re Lau OW Bew, 141 U. S. 583 9

The Conqueror, 166 U. S. 1100 9

United States v. The Three Friends, 166 U. S. 1 9

United States v. Hole, et al., 38 Fed. Supp. 600, 604 14

RULES AND STATUTES.

Federal Code Title 28, U. S. C. A. 347 (a) 6

Rule 8 (d) R. F. P. 13

National Banking Act, 12 U. S. C. 34 (a) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its individual capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET de KORWIN, individually, and as Executrix of the Will of Joseph Maria de Korwin, Deceased,

Respondents.

REPLY OF HOWARD D. MOSES, GUARDIAN AD LITEM, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Howard D. Moses, Guardian ad Litem, respectfully submits this as his reply to the petition for writ of certiorari to review the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit in the

above entitled cause reversing the judgment of the District Court for the Northern District of Illinois, Eastern Division, which had dismissed the above entitled cause of action.

STATEMENT.

The statement of the petitioner is incomplete and misleading. It would, therefore, be difficult for this Court to pass upon the application of the law involved without amplifying the statement contained in the original petition.

The statement of the petitioner conveys the impression that the jurisdiction of the District Court is invoked in this cause merely upon the ground of diversity of citizenship, when, in fact, the complaint alleges additional grounds of jurisdiction, namely, a class action and a Federal question involved. The statement of the petitioner also neglects to comment upon the status of the pleadings in that the Guardian ad Litem filed a cross-claim and counter-claim to the complaint in which a Federal question is alleged and which counter-claim and cross-claim, independent of the complaint, would invoke the jurisdiction of the Federal Court.

Upon filing the motion to strike the complaint on jurisdictional grounds, an order was entered in the District Court continuing the time for filing an answer to the counter-claim and cross-claim until twenty days after the determination of the motion to strike the complaint (Rec. 117). No answer or motion to strike the counter-claim or cross-claim was filed by any litigant, and yet after ruling on the motion to strike the complaint, the District Court dismissed the cause of action and with it the cross-claim and counter-claim of the Guardian ad Litem.

The Petition for Certiorari raises the jurisdictional question of diversity of citizenship, one of the jurisdictional allegations of the complaint. It is not a jurisdictional ground in the cross-claim and counter-claim. Since the attorney for the plaintiff argued the question of re-alignment of the parties and diversity of citizenship in the Circuit Court of Appeals, argument upon the question of diversity of citizenship will be dispensed with herein since it is expected it will be adequately argued in the reply of the attorney for the plaintiff.

Jurisdiction of This Court.

This Court is without jurisdiction to issue a writ of certiorari to the United States Circuit Court of Appeals for the Seventh District in this matter under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. 347(a) in that the judgment of the United States Circuit Court of Appeals for the Seventh District reversing and remanding the cause to the District Court is not a final judgment or decree, and the reasons given by the Circuit Court of Appeals for their decision is not in conflict with any local law of Illinois or decisions of other Circuit Courts of Appeal or any decisions of this Court in any respect.

PROPOSITIONS OF LAW RELIED UPON.

I.

The judgment of the circuit court of appeals reversing the trial court and remanding the cause to the trial court for further proceedings is not a final judgment or decree upon which this court may issue a writ of certiorari.

Federal Code Title 28, U.S.C.A. 347(a).

Slaker, Administrator, v. *O'Connor,* 49 S. Ct. 158, 278 U. S. 188, 73 L. Ed. 258

Martinez v. *International Banking Corporation,* 220 U. S. 214, 223

Drake v. *Kochersperger,* 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 942

Clark v. *Kansas City,* 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. Rep. 207

Chicago & Northwestern Ry. Co. v. *Osborne; Chicago & Northwestern Ry. Co.* v. *Junod,* 146 U. S. 354, 355.

Kingman & Company v. *Western Manufacturing Company,* 170 U. S. 675, 42 L. Ed. 1192.

Re Lau Ow Bew, 141 U. S. 583

The Conqueror, 166 U S. 1100.

United States v. *The Three Friends,* 166 U. S. 1.

II.

The judgment of the circuit court of appeals was proper in that the order dismissing the cause of action was erroneous if only the complaint was insufficient when a cross-claim and a counter-claim are on file with sufficient averments of jurisdiction.

Jefferson v. *Gypsy Oil Co.*, 27 Fed. (2d), 304, 305, 306.
National Banking Act, 12 U. S. C. 34 (a).

III.

The judgment of the circuit court of appeals was proper in that the trial court in considering the sufficiency of the complaint without consideration of the sufficiency of the cross-claim or counter-claim could only enter an order with respect to the complaint, and it was error to dismiss the entire cause of action and with it the cross-claim and counter-claim.

Merchants Heat & Light Co. v. *James B. Clow & Sons*, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488.
Ginsburg v. *Pacific Mutual Life Insurance Company of California*, 69 Fed. (2d) 97, 98.
Metropolitan Holding Co. v. *Snyder*, 70 Fed. (2d) 263, 268.
Goldstone v. *Payne*, 94 Fed. (2d) 855, 857.
Rule 8 (d) R. F. P.
United States v. *Hole, et al*, 38 Fed. Supp. 600, 604.
Johnson v. *Umstead*, et al, (C. C. A.) 64 Fed. (2d) 316.

ARGUMENT.

I.

The judgment of the circuit court of appeals reversing the trial court and remanding the cause to the trial court for further proceedings is not a final judgment or decree upon which this court may issue a writ of certiorari.

The provisions of the Federal Code under Title 28, U.S.C.A. 347(a) relied upon by the petitioner providing for certiorari either before or after judgment or decree of the lower court gives the Supreme Court a broad discretion of its jurisdiction to issue a writ of certiorari at any stage of the appeal in the Circuit Court of Appeals. The Supreme Court, however, has, by its various decisions, consistently restricted the right to petition by certiorari before judgment to cases involving public welfare, statutory appeals from governmental agencies, and certification by the Circuit Court of Appeals, itself, regarding certain phases of a case before it for decision. Even in those few cases, the Supreme Court has required that the petition for certiorari be filed before judgment in the Circuit Court of Appeals rather than after judgment. If the petition for certiorari is presented after judgment, it must be a final judgment or decree so that the Supreme Court would not be called upon to decide the case piecemeal. The judgment of the Circuit Court of Appeals in this cause reversing the trial court and remanding the cause for further proceedings in the District Court is not a final

judgment or decree upon which the Supreme Court will issue a writ of certiorari.

Slaker, Administrator, v. *O'Connor,* 49 S. Ct. 158, 278, U. S. 188, 73 Law. Ed. 258, which was decided after the Act of February 13, 1925, amending Section 240(a) of the Judicial Code, is a case in which the Circuit Court of Appeals reversed the action of the trial court and remanded the cause for further proceedings, which was exactly the judgment in this case. There this court said:

> "Manifestly, the decree below is not final. Under the Act of February 13, 1925 (43 Stat. at L. 939, Chap. 229, U.S.C. Title 28, Par. 347), Par. 240(b) appeals to this court from Circuit Courts of Appeal lie only from final judgments or decrees (*Martinez* v. *International Banking Corporation,* 220, U S. 214, 223, 55 L. Ed. 438, 443, 31 Sup. Ct. Rep. 408) * * *"

In the Martinez case, the Supreme Court said:

> "It follows that although the Appellate Court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence its judgment was not final for the purpose of an appeal on writ of error. *Drake* v. *Kochersperger,* 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 942; *Clark* v. *Kansas City,* 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. Rep. 207. Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness due the plaintiff, and complies with the other directions contained in the mandate, it cannot be said that a final decree has been entered in the cause. * * * But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this court to final judgments, is that cases should not be brought here by piecemeal through the medium of successive appeals." (*Martinez* v. *International Banking Corporation,* 220

U. S. 214, 223, 55 L. Ed. 438, 443, 31 Sup. Ct. Rep. 408).

One of the leading cases which has been consistently followed by the Supreme Court of the United States is the case of *The Chicago & Northwestern Railway Company* v. *John Osborne* consolidated with *The Chicago & Northwestern Railway Company* v. *Junod,* 146 U. S. 354, 355. In that case it was held that a case cannot be removed by a writ of certiorari from the Circuit Court of Appeals to the Supreme Court except in cases where a judgment of that court was a final one. In this case the Circuit Court of Appeals reversed the judgment of the trial court and remanded the case for proceedings consistent with the opinion, and the judgment of the Circuit Court of Appeals was not final and could not be removed to the Supreme Court by writ of certiorari. In no instance to our knowledge has the Supreme Court deviated from this rule.

In *Kingman & Company* v. *Western Manufacturing Company,* 170 U. S. 675, 42 Law Ed. 1192, the court says:

> "Certiorari is the proper remedy to review a decision of the Circuit Court of Appeals dismissing, for want of jurisdiction, a case within the class of cases in which the judgment of that court is made final."

In no case has the Supreme Court issued a writ of certiorari where the judgment of the Circuit Court of Appeals was not final except in those cases where the Circuit Court of Appeals certified a question to the Supreme Court *before* judgment of the Circuit Court of Appeals. This has only occurred when the Supreme Court is considering a case involving the same points and could decide the cases together, or where the question is of great public interest and of sufficient gravity and importance to concern the welfare of the nation, or where the matter is one of international concern, including appeals from agencies of the govern-

ment such as the Interstate Commerce Commission, the Federal Trade Commission and other agencies where statutory provision for appeal to the Supreme Court is given. *Re Lau Ow Bew,* 141 U. S. 583; *The Conqueror,* 166 U. S. 110; *United States* v. *The Three Friends,* 166 U. S. 1.

II.

The judgment of the circuit court of appeals was proper in that the order dismissing the cause of action was erroneous if only the complaint was insufficient when a cross-claim and a counter-claim are on file with sufficient averments of jurisdiction.

The counter-claim of Howard D. Moses, Guardian ad Litem for the Infant and Incompetent or Insane Defendants, alleges, (Rec. 100) as follows:

> "That a vacancy presently exists in the trust created by the Last Will and Testament of Otto Young, deceased, and has existed since the 11th day of February, 1929, when the Trustee, named in said Testamentary Trust, consolidated with the Union Bank of Chicago and that the defendant, First National Bank of Chicago, a national banking association, has since July 17, 1933, acted as Trustee under the Testamentary Trust of Otto Young, deceased, de son tort and that as a result thereof the said defendant, First National Bank of Chicago, has acted without authority and thereby assumed all of the risks attendant upon its management and should be ordered by this court to account for all losses resulting therefrom without benefit of any profits and without benefit and compensation for their services, commissions, fees paid to themselves, their agents, attorneys and employees out of the assets of said trust; that defendant, First National Bank of Chicago, since the consolidation of the First Union Trust & Savings Bank with it, is not a

continuation of the same legal entity as the First Union Trust & Savings Bank or its predecessor, the First Trust & Savings Bank of Chicago, Trustee, named in the last Will and Testament of Otto Young, deceased; that said First Union Trust & Savings Bank after July 17, 1933, ceased to exist and the First National Bank of Chicago, which is a different corporation established under the laws of a different sovereignty, possessed of different powers, owing allegiance to a different jurisdiction, governed by different laws and subject to different governmental supervision, continued as the same legal entity as it had prior to said alleged consolidation and could not by any remote construction of the law and the facts be construed as a continuance of the same legal entity appointed Trustee under the last Will and Testament of Otto Young, deceased; THAT THE SAID LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED, PROVIDES FOR A SUCCESSOR IN TRUST OR A NEW TRUSTEE TO BE APPOINTED BY A COURT OF COMPETENT JURISDICTION AND THAT THE PROVISIONS OF THE NATIONAL BANKING ACT IN FORCE AND AS AMENDED ON JULY 17, 1933, COULD NOT DEPRIVE THE COURT OF ITS JUDICIAL FUNCTION AND THAT ANY ATTEMPT OF CONGRESS TO DO SO IS AN INFRINGEMENT BY THE LEGISLATIVE BRANCH OF GOVERNMENT UPON THE RIGHT OF THE JUDICIARY: that the right of the Trustee named in the last Will and Testament of Otto Young, deceased, by agreement to consolidate with any other bank or trust company enables the said Trustee to designate its successor when the Will of Otto Young specifically provides that the successor in trust should be appointed by a court of competent juridiction and that the agreements of the Trustee to designate the successor in trust are beyond the rights, powers and duties given it under the said last Will and Testament of Otto Young, deceased."

Also the cross-claim of Howard D. Moses, as Guardian ad Litem for the Infant and Incompetent or Insane Defendants, sets forth the same averments of the Federal question to be decided by the court, (Rec. p. 110).

The provisions of the National Banking Act which requires the construction of the court are in 12 U. S. C. 34 (a) and reads in part as follows:

> "* * * such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such contituent institution at the time of such consolidation."

The Federal question involved is strongly and substantially pleaded in the above averments and calls for an interpretation of the National Banking Act to determine whether or not that part of the Act, as amended, is constitutional which permits national banks to take over fiduciary trusts which are under the jurisdiction of a court without allowing the court its right to appoint a successor. In other words, should a Trustee have the right to appoint its successor by consolidation with its successor and thereby deprive the court of the right to appoint or approve such successor trustee, contrary to the provisions of the trust created by the Will?

In the case of *Jefferson* v. *Gypsy Oil Co., et al,* 27 Fed. (2d) 304, the court holds that if the action involves and

its determination depends upon the construction of certain laws of the United States, then Federal jurisdiction follows. It points out that the dispute must involve a substantial question as to the construction of Federal Statutes and not a colorless or frivolous one, and it is the contention of this respondent to the petition for certiorari that the allegations of the cross-claim and counter-claim clearly involve a substantial question of construction of the Federal Banking Act, as amended.

III.

The judgment of the circuit court of appeals was proper in that the trial court in considering the sufficiency of the complaint without consideration of the sufficiency of the cross-claim or counter-claim could only enter an order with respect to the complaint, and it was error to dismiss the entire cause of action and with it the cross-claim and counter-claim.

In the case of the *Metropolitan Holding Co.* v. *Snyder*, 79 Fed. (2d), 263, 268, the court says:

> "The court is required to determine from the evidence whether the Decree was right or whether some other decree should be entered this being in the nature of a trial de novo. *Johnson* v. *Umsted, et al,* (CCA) 64 Fed. (2d), 316."

It is apparent from the record that the District Court gave no consideration to the averments of the cross-claim or counter-claim and that if justified in dismissing the complaint, the order entered by the trial court should be remanded with directions to limit the order to the complaint and not to the entire cause of action, including the cross-claim and counter-claim filed by the Guardian ad Litem.

In the case of *Ginsburg* v. *Pacific Mutual Life Insurance Co. of California,* 69 Fed. (2d), 97, at page 98, the court says:

> "We need not consider the jurisdiction controversy as to the amount the appellant sues to recover because the counter-claim interposed establishes the jurisdiction of the District Court. *Merchants' Heat & Light Co.* v. *James B. Clow & Sons,* 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488."

This decision is also cited by the Second Circuit in *Goldstone Co.* v. *Payne,* 94 Fed. (2d), 855, 857.

It is clear from these decisions that where the counter-claim or cross-claim makes sufficient averments of a Federal question involved the filing of such counter-claim can give the court jurisdiction of a case whether the original complaint has sufficient jurisdictional averments or not.

The trial court could not properly dismiss the entire cause of action and with it the cross-claim and counter-claim to which no answer or motion to strike was filed and were not at issue.

The order of the District Court dismissing the entire cause of action includes in the order of dismissal the cross-claim and counter-claim to which no answer had been filed to either and no motion to strike either cross-claim or counter-claim had been filed and, therefore, neither the cross-claim nor the counter-claim were at issue and no hearing was had on the sufficiency or insufficiency of the cross-claim or counter-claim and no mention of the sufficiency or insufficiency of the cross-claim or counter-claim was incorporated in the order dismissing the cause of action.

Under Rule 8 (d) of the Rules of Federal Procedure,

averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. In the case of *United States* v. *Hole, et al,* 38 Fed. Supp., on page 604, the court says:

> " * * * A reply under the Rules of Civil Procedure is required if the answer contains a counter-claim, denominated as such."

In this case there were no pleadings filed by any of the parties putting the counter-claim and cross-claim in issue and, therefore, the order dismissing the cause should have been limited to the complaint and not include cross-claim or counter-claim as it did in the order dismissing the entire cause of action.

CONCLUSION

This court may, of course, in the exercise of its discretion under the broad language of Section 240(a) of the Judicial Code as amended, issue the writ of certiorari which, however, would be unique and contradictory to all precedent when the judgment of the Circuit Court of Appeals was not final nor even an interlocutory order, but reversed and remanded the cause to the trial court for further proceedings.

Furthermore, the jurisdictional question of diversity of citizenship is not the only ground upon which jurisdiction is vested in the Federal Court, but there are also averments in the complaint and in the cross-claim and counter-claim alleging additional jurisdictional grounds, namely a Federal question is involved and the complaint alleges this to be a class suit.

Wherefore, it is respectfully submitted that the writ of certiorari to review the decision herein of the Circuit Court of Appeals for the Seventh District be denied.

HOWARD D. MOSES,
Attorney Per Se.

CHARLES G. CULVER,
Attorney for Howard D. Moses.
Guardian ad Litem.

Of Counsel:
ADAMS, MOSES & CULVER,
231 South La Salle Street,
Chicago, Illinois.

FILE COPY

DEC 9 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Petitioners,

vs.

MARGARET DE KORWIN, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

CHARLES RIVERS AIKEN,
Attorney for Respondent.

U. S. Law Printing Co., Phone Lakeview 6581, Chicago, Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

NO. 696

THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Petitioners,

vs.

MARGARET DE KORWIN, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

May It Please The Court:

I.

There Is No Conflict Of Decisions Presented By The Record.

In their anxiety to present a case meriting the consideration of this Court on further review, petitioners have dis-

torted and misrepresented the record. There is in actuality no conflict between the ruling below and decisions of either other Federal or State courts.

Grossest misrepresentation by petitioners is in their claim that this proceeding was an action to contest the validity of a will. In stating the question presented, petitioners say (p. 9): "This suit attacks the validity of an Illinois resident's will". Again, at page 20, the petitioners say: "In a case such as this to contest a will . . .". At several other points petitioners attempt to create the impression this suit was brought to contest the will of Otto Young.

Their purpose is plain. The Illinois statute, creating a right to contest the validity of a will, requires joinder of all the decedent's heirs as a prerequisite to such relief (Ill. Rev. Stat., chap. 3, sec. 243). Therefore, if this were in fact the statutory action to contest a will, all heirs would have been indispensable parties. Also, the indispensability of parties in such a case is a matter of substance.

Even without reference to the record, the petitioners' distortion becomes absurd upon a moment's reflection. Petitioners point out that Otto Young's will was admitted to probate in 1906 (p. 3). The instant suit was brought in 1934, some thirty-eight years afterward, according to the petitioners (p. 6). Yet, the Illinois statute authorizing actions to contest wills provides that such proceedings must be commenced within nine months after admission of the instrument to probate (Ill. Rev. Stat., 1945, chap. 3, sec. 242). Moreover it has been held by this Court that the decree of a probate court cannot be set aside in federal equity court. (*Simmons* v. *Saul*, 138 U. S. 439; *Kieley* v. *McGlynn*, 88 U. S. 503; *Sutton* v. *English*, 246 U. S. 199.)

Recourse to the record, however, demonstrates conclusively that the instant proceeding was not an action to contest a will.

This Court recently reaffirmed the proposition that diversity jurisdiction "must be ascertained from the principal purpose of the suit, and the primary and controlling matter in dispute". (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69.) As the record shows, a construction of the will of Otto Young is the principal purpose of this suit and the primary and controlling matter in dispute.

While not controlling, still significant is the entitling of plaintiff's bill as "Complaint In Chancery To Construe Will, Etc." (R. 3). Furthermore, the main prayer for relief is as follows:

> "That the Court may declare and establish the true meaning of, and the proper construction to be placed upon, the last will and testament of Otto Young, deceased, particularly in respect of the specific provisions thereof set forth in the three counts of this complaint . . ."

In their answering brief in the reviewing court below, the petitioners explicitly admitted that the suit was primarily a proceeding for the construction of a will. There they said (p. 68):

> "It is obvious that the point of controversy between the parties hereto involves a construction of the will of Otto Young."

The Court of Appeals in its opinion found that this proceeding had as its principal purpose the construction of Otto Young's will. The Court said (R. 187):

> "True, the complaint does ask for a partition and division of the trust estate as part of the relief prayed for. This is but incidental, however, to the main pur-

> pose of the suit which is the constructon of the will of Otto Young. The prayer for the partition may properly be treated as surplusage."

This finding by the Circuit Court of Appeals is not challenged by petitioners. It may not, therefore, be urged in good faith here that the complaint under consideration was not basically a bill for the construction of a will.

In the case at bar, all beneficiaries of the testamentary trust are joined as parties defendant along with the trustee (R. 129-131). Only certain heirs who do not take under the will are omitted as defendants. The leading text writer on the subject states that heirs who are not beneficiaries of the testamentary trust need not be joined as parties.

In Thompson on Construction of Wills, the author says (sec. 620, p. 796):

> "A bill praying for the construction of a will is a bill primarily for construction, even though it contains a prayer to remove a cloud from the title, and the prayer to remove the cloud will be treated as surplusage."

This leading textwriter goes on to point out (sec. 619, pp. 793-794):

> "As a general rule in a proceeding to construe a will, all the parties named in the will as legatees or devisees are necessary parties . . . Heirs of the testator expressly excluded from taking under the will are not proper or necessary parties."

In attempting to make a case for certiorari, the petitioners have seized upon a passing observation of the Court below, removed it from its context, and set it out as the decision which conflicts with the other courts, Federal and State. Such is the strain under which petitioners have labored in seeking to procure issuance of the writ.

The comment into which petitioners have read the violent conflicts appearing in their petition is (R. 185):

> "We think the rule as to the indispensability of parties must be determined by Federal rather than local rules."

In making their point as to the presence of a conflict, petitioners cite two opinions by the Eighth Circuit Court of Appeals where it was said that the indispensability of parties would be controlled by the State statute (*Young* v. *Garrett*, 14 F. 2d 223; *Thomson* v. *Butler*, 136 F. 2d. 644).

It is to be noted that both of the cited cases were actions at law. The *Young* case was an action in ejectment; the *Thomson* case was a statutory proceeding to contest the validity of a will. It was specifically held in each opinion that the Conformity Act was controlling.

The postured conflict is shown to be more apparent than real by another decision of the same Court of Appeals. In *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.*, 98 F. 2d 416, 420, the Eighth Circuit Court of Appeals held that as to the indispensability of parties, State law controls substantive rights and as to remedial or procedural rights the Federal rules govern. In this connection the Court said (p. 420):

> "The Conformity Act of 1872, 88 U.S.C.A., sec. 724, by its terms is not applicable to equity causes."

It becomes obvious, then, that the petitioners have given no thought to the differentiation between suits in equity, such as the case at bar, and actions at law, such as the *Young* and *Thomson* cases relied on for the conflict. Likewise, it is clear the petitioners have made no distinction between the substantive and remedial aspects of the general question as to the indispensability of parties.

It would seem plain that where a joinder of certain persons is a requisite to the right of action itself, the indispensability of such parties is a matter of substance and would be governed by State law. On the other hand, where the joinder of persons is not a part of the right of action but the question is largely a matter of convenience or policy, such as whether the court can do justice to the parties before it without injuring any absent persons, the problem is procedural or a question of remedy and is controlled by Federal rules.

This Court, itself, has said (*Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80):

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not."

In *Seeley* v. *Cornell*, 74 F. 2d 353, which was a proceeding greatly resembling the case at bar, the Court held that coheirs were not indispensable parties. This Court denied certiorari (295 U. S. 742). The Court of Appeals in deciding the *Seeley* case said (p. 355):

> "The rule as to who are considered indispensable parties in a suit in equity in federal courts has been repeatedly announced by the Supreme Court.. In substance it is: where the interests of the parties before the court are separable from those of the parties omitted, and the court can do justice between the parties before it, without prejudice to the rights of the absentees, jurisdiction will be maintained." (Citing *Horn* v. *Lockhart*, 17 Wall. 570; *Payne* v. *Hook*, 7 Wall. 425; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33.)

This position was adopted in the case at bar by the Court below. The Court of Appeals founded its decision on the same decisions by this Court: *Horn* v. *Lockhart*, *Payne* v. *Hook*, and *Waterman* v. *Canal-Louisiana Bank Co.*

Assuming arguendo, that there were substance to the petitioners' claim of conflict and that the State law controlled the indispensability of parties in the case at bar, the same result would obtain upon this record. The Illinois Supreme Court held in *Pennsylvania Co.* v. *Bauerle*, 143 Ill. 459, 462:

> "The heirs of the testator are not necessary parties to a bill filed for the construction of a will as to the residuary estate, when, after special bequests, all the residue of the estate is given to certain devisees, but the latter are necessary parties."

Petitioners in presenting their case have lost sight of the fact that indispensability to the diversity of citizenship jurisdiction is peculiar to the Federal courts and could not be controlled by State law (*Equitable Trust Co.* v. *Denney*, 24 F. 2d. 169, 170; *Bogard* v. *Southern Pac. Co.*, 228 U. S. 137).

Moreover, petitioners have not borne in mind that no allegations have been made against the omitted heirs, nor is any relief sought from them. In *Payne* v. *Hook*, 74 U. S. 425, the Court said (p. 432):

> "It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked."

In short, petitioners' position here is not in agreement with the fundamental view of this Court on the subject, as announced by Mr. Justice Sutherland in *Bourdieu* v. *Pacific Oil Co.*, 299 U. S. 65, 70:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the Court, it will be done; and a court of equity will strain hard to reach that result."

II.

The Decision Below Is Sustainable On Other Grounds Than The Reasons Of The Opinion.

Unnoticed by the petitioners are two other grounds sustaining the judgment of reversal by the Court of Appeals. These grounds were urged in the briefs below, and noticed in the opinion (R. 187):

> "Our rulings upon the issues discussed make it unnecessary to consider other questions raised by the parties in their briefs."

Upon this record it is admitted by the petitioners that the complaint states a good class suit, and a Federal question is presented, each which would sustain the jurisdiction regardless of diversity of citizenship. We merely mention this phase of the record to suggest the truly frivolous character of the petition.

Conclusion.

The individual citizenship of each defendant was not specifically alleged in the original complaint (R. 4). Instead, the allegation as to citizenship was laid generally (R. 4):

> "The individual defendants are citizens of the States of California, Florida, Illinois, Maryland, Michigan, New Jersey, and Pennsylvania."

This averment was technically defective under *Robertson* v. *Pease*, 97 U. S. 646, 649, holding that the citizenships of each defendant should be specifically alleged.

Respondent moved in the trial court for leave to file her amended complaint correcting this technical defect (R.

128). Leave to file the amended complaint was denied(R. 161). This was one of the errors assigned in the Court of Appeals. Petitioners took the position there that the trial court correctly denied us even leave to file the amended complaint. This Court passed on a similar point in *Bell* v. *Preferred Life Society*, 320 U. S. 238, where it was held (p. 242):

> "A complaint filed in a federal court should not be dismissed for want of jurisdiction because of a mere technical defect such as would make it subject to a special motion to clarify."

We submit the petition sets forth no proper grounds for issuance of the write of certiorari, that the judgment of reversal by the Circuit Court of Appeals is right, and that the petition should be denied.

Respectfully submitted,

CHARLES RIVERS AIKEN,
Attorney for Respondent.